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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. OMAR ALIRIO GUZMAN, Defendant and Appellant.	G049117 (Super. Ct. No. 10SF1222) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Kristine A. Gutierrez, and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Omar Alirio Guzman of eight counts of lewd acts on children under the age of 14 (Pen. Code, § 288, subd. (a)) and found true the allegation that defendant had committed the crimes against multiple victims (Pen. Code, § 667.61, subds. (b), (c)(8), (e)(4)). The trial court sentenced defendant to 120 years to life in state prison, a sentence comprised of eight consecutive 15 years to life terms.

Defendant claims insufficient evidence supports his conviction on count 5. Defendant also claims the court erred by failing to consider Evidence Code section 352 before instructing the jury that it could use evidence of charged offenses for propensity purposes pursuant to a modified version of CALCRIM No. 1191. We affirm the judgment.

FACTS

The third amended information accused defendant of committing eight counts of lewd acts on children under the age of 14. Counts 1 through 5 pertained to victim Jane Doe No. 1 during the time period of February 2009 to December 2010, and varied in the precise conduct alleged: (1) touched body; (2) touched breast; (3) touched breast; (4) mouth on genitals; and (5) touched genital area. Counts 6 and 7 pertained to victim Jane Doe No. 2 during the time period of May 2009 to December 2010, and involved separate instances of touching in the breast area. Count 8 pertained to victim Jane Doe No. 3.

The prosecutor relied primarily on the testimony of the victims and out-of-court interviews of the victims (conducted immediately after the victims' allegations were reported to law enforcement) to prove her case against defendant. The victims' mothers, a police officer, and a social worker also testified. Defendant did not testify on his own behalf; the only witness called by the defense was the social worker, in an attempt to elicit testimony suggesting inconsistencies in the victims' reports of abuse.

Jane Doe No. 1

Jane Doe No. 1 was born in February 2000. She lived in a Mission Viejo condominium complex with her family (including her younger sister, Jane Doe No. 2) during the relevant time period, i.e., 2009 to 2010. Defendant lived in the same complex with his wife and daughter. Jane Doe No. 1 befriended defendant's daughter, which led to Jane Doe No. 1 and Jane Doe No. 2 visiting defendant's home frequently. Molestation allegations came to light around November 30, 2010, when Jane Doe No. 1 and Jane Doe No. 2 were watching a television program with their mother that featured an adult male character who molested his daughter's friend. Jane Doe No. 1 and then Jane Doe No. 2 cried and told their mother that defendant was doing the same things to them.

Defendant began touching Jane Doe No. 1 when she was nine years old. On the first occasion, while she was sitting on the sofa in defendant's living room, defendant put his hands inside Jane Doe No. 1's clothing and touched the sides of Jane Doe No. 1's body. Jane Doe No. 1 pushed her arms against her sides to stop defendant, who removed his hands.

On more than five occasions, defendant touched Jane Doe No. 1's breasts underneath her clothing. These incidents happened in defendant's living room. Defendant would sit next to Jane Doe No. 1 on the couch; twice, he grabbed her hands to stop her from moving away. Defendant would touch Jane Doe No. 1 when the other girls were not looking.

On one occasion, after Jane Doe No. 1 finished using the restroom, defendant blocked the door to his daughter's room. Defendant chased Jane Doe No. 1 into the living room. Pointing to Jane Doe No. 1's breasts and vagina, defendant said, "I kiss you right there and right there." Defendant pulled down Jane Doe No. 1's pants. Defendant kissed her vagina, then lifted up her shirt and kissed one of her breasts. Defendant asked Jane Doe No. 1 to be his girlfriend. This happened when Jane Doe No.

1 was 10 years old and in fourth grade, and was the last time defendant touched Jane Doe No. 1.

Jane Doe No. 1 – Count 5

The foregoing evidence pertained to counts 1 to 4. Count 5, by which defendant was accused of touching Jane Doe No. 1's vagina, is challenged in this appeal for lack of substantial evidence.

At her out-of-court interview, the interviewer asked Jane Doe No. 1 whether defendant ever touched her private part with his hand. Jane Doe No. 1 responded with unclear language (but apparently with gestures that communicated something more to the interviewer), "He would go like this and he would put them down and he would try to touch them." Defendant "was putting his hands in here and he was going . . . ." Asked how many times defendant's hand touched her private, Jane Doe No. 1 replied, "Twice." The interviewer continued, "Okay and was that right on the skin of your private like was he inside of your underwear or on the . . . top of your underwear?" Jane Doe No. 1 responded, "Mm . . . . once on top and once in." Jane Doe No. 1 later clarified that one time was on top of her pants rather than on top of her underwear. Defendant did not put his fingers inside the vaginal opening the time he touched Jane Doe No. 1 directly on the skin. But "it felt weird."

At trial, Jane Doe No. 1 testified (in response to the question, "Was there any other place that you remember him touching you?") that defendant touched her vaginal area by placing his hand underneath her underwear. Defendant "just touched it." He did this "more than five times." Defendant touched Jane Doe No. 1 on the vagina while they were sitting on the couch. On cross-examination, Jane Doe No. 1 disagreed with leading questions from defense counsel suggesting the touching was painful, that Jane Doe No. 1 was sore afterward, and that defendant put his finger inside Jane Doe No. 1's vagina.

Jane Doe No. 2

Jane Doe No. 2 was born in May 2001. When she was around eight years old, Jane Doe No. 2 played at defendant's residence. Defendant touched Jane Doe No. 2's breasts over her clothes more than five times ("a lot"). Defendant did not touch Jane Doe No. 2 under her clothing. At her interview, Jane Doe No. 2 was not sure how many times it happened, but it was more than once. Jane Doe No. 2 was eight years old the first time defendant touched her, and he also touched her when she was nine years old. The touching always happened in or near the hallway of defendant's residence.

Jane Doe No. 3

Jane Doe No. 3 was born in July 1998 and was also a close friend of defendant's daughter. They frequently slept at each other's houses on weekends. In August 2010, Jane Doe No. 3 was sleeping at defendant's house. She was on the living room floor with defendant's daughter, Jane Doe No. 1, and Jane Doe No. 2. Jane Doe No. 3 awoke to find defendant feeling her breasts over her clothing, moving his fingers in a circular motion. Jane Doe No. 3 turned around and defendant touched Jane Doe No. 3's buttocks over her clothing. The incident lasted approximately five minutes. Jane Doe No. 3 did not mention defendant touching her buttocks at her first out-of-court interview because she was embarrassed; she returned for a second interview (and told about defendant touching her buttocks) because her mother instructed her to tell the truth.

DISCUSSION

Sufficiency of Evidence Supporting Count 5

"[A]ny person who willfully and lewdly commits any lewd or lascivious act . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or

sexual desires of that person or the child, is guilty of a felony . . . ." (Pen. Code, § 288, subd. (a).)

Defendant contends the evidence was insufficient to support his conviction on count 5, which accused defendant of touching Jane Doe 1 on the vagina. Defendant acknowledges Jane Doe No. 1 "was able to articulate specific facts supporting four different incidents of abuse, but [claims she] failed to provide sufficient evidence supporting count 5."

A reviewing court should not "'"ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." [Citation omitted.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) Substantial evidence is evidence that is "reasonable, credible, and of solid value . . . ." (*Id*. at p. 578.) Reasonable inferences may be made from substantial evidence. But inferences "'"may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work."'" (*People v. Raley* (1992) 2 Cal.4th 870, 891.)

"Does the victim's failure to specify precise date, time, place or circumstance render generic testimony insufficient? Clearly not. . . . [T]he particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction." (*People v. Jones* (1990) 51 Cal.3d 294, 315.) "The victim, of course, must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct . . . . Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information . . . . Finally, the victim must be able to describe *the general time period* in which these acts occurred . . . to assure the acts were committed

within the applicable limitation period." (*Id*. at p. 316.) A victim's testimony alone can amount to substantial evidence; "California law does not require corroboration of the testimony of a child sexual abuse victim . . . ." (*People v. Harlan* (1990) 222 Cal.App.3d 439, 454.)

The evidence here was sufficient to support the conviction on count 5, lewd conduct based on defendant touching Jane Doe No. 1's vagina with his hand. It is true there were some inconsistencies, such as the number of times defendant touched Jane Doe No. 1's vagina (twice or more than five times) and whether all of the touching was directly on the skin or over clothes. It is also true that Jane Doe No. 1 did not provide many details concerning the circumstances in which defendant touched her vagina. But, as set forth above in the recitation of facts, Jane Doe No. 1's testimony and out-of-court interview amply describe the type of act, the fact that it occurred at least once, and the general time period during which it occurred (implicitly, sometime between the first and last instances of lewd touching). Evidence also suggested the touching occurred on defendant's couch in his living room. It was for the jury to decide whether to believe that defendant touched Jane Doe No. 1's vagina.

Use of Modified Version of CALCRIM No. 1191

The court instructed the jury with a modified version of CALCRIM No. 1191 as follows: "The People presented evidence that the defendant committed the crimes of Lewd Act On A Child Under Fourteen, as alleged in Counts 1-8. These crimes are defined for you in the instructions for these crimes. If you decide that the defendant committed one of these charged offenses beyond a reasonable doubt, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit the other charged crimes, and based on that decision also conclude that the defendant was likely to and did commit the other charged crimes. If you conclude that the defendant committed a charged offense, that conclusion is only one factor to consider

along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of another charged offense. The People must still prove each element of every charge beyond a reasonable doubt and prove it beyond a reasonable doubt before you may consider one charge as proof of another charge."

Although it does not appear defendant made any specific objection to the provision of this instruction below (defense counsel merely noted, "The defense also wanted to lodge its objection to instruction 1191 that the People proposed"), defendant now claims this instruction was improper because Evidence Code section 1108[1] should not be read to authorize the use of evidence of charged offenses as propensity evidence. Our Supreme Court, reviewing a nearly identical jury instruction in *People v. Villatoro* (2012) 54 Cal.4th 1152, 1167-1169 (*Villatoro*), concluded otherwise. Defendant concedes we are obligated to follow *Villatoro*. Defendant notes he will call on the Supreme Court to revisit this issue and (if unsuccessful) pursue the claim in federal court. We agree with both parties that we are required to reject defendant's claim of instructional error.

Lack of Explicit Analysis of Prejudicial Impact of Instruction

Relatedly, defendant asserts the court erred by failing to apply section 352 before allowing the jury to treat evidence of charged offenses as propensity evidence.

Section 1108 "permits evidence that the defendant committed other sexual offenses to prove his propensity to commit the charged sexual offenses." (*People v. Cottone* (2013) 57 Cal.4th 269, 281.) "The general public policy on character or propensity evidence is that it is *not* admissible to prove conduct on a given occasion. [Citations.] Section 1108 creates a narrow exception to this rule based on the recognition that '"[t]he propensity to commit sexual offenses is not a common attribute among the

[1] All subsequent statutory references are to the Evidence Code.

general public.""" (*Id.* at p. 285.) Section 1108 applies both to charged and uncharged sexual offenses. (*Villatoro, supra,* 54 Cal.4th at pp. 1164-1167.)

The *admissibility* of evidence of *uncharged* sexual offenses is limited by section 352. (§ 1108, subd. (a) ["if the evidence is not inadmissible pursuant to Section 352"]; see § 352 ["The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury"].) "Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, it's likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

Of course, unlike cases in which the admission of evidence of *uncharged offenses* is at issue, there is no question of the court excluding evidence that defendant committed the *charged offenses* in this case pursuant to section 352. (*Villatoro, supra,* 54 Cal.4th at p. 1163.) Evidence of charged offenses must be admitted to prove the charged offenses. But "'[e]ven where a defendant is charged with multiple sex offenses, they may be dissimilar enough, or so remote or unconnected to each other, that the trial court could apply the criteria of section 352 and determine that it is not proper for the jury to consider one or more of the charged offenses as evidence that the defendant likely committed any of the other charged offenses.'" (*Ibid.*) Hence, in some cases, courts should not provide an instruction authorizing the jury to make propensity inferences based on evidence of charged offenses proved beyond a reasonable doubt.

Defendant did not specifically ask the court to reject the modified version of CALCRIM No. 1191 on the grounds that it would be unduly prejudicial or otherwise violate the principles stated in section 352. The court did not conduct a section 352 analysis on the record. Ordinarily, a claim of error under section 352 is forfeited when not raised at trial. (*People v. Ervine* (2009) 47 Cal.4th 745, 777; see § 353, subd. (a) [objection making "clear the specific ground of the objection or motion" required for reversal on grounds of improperly admitted evidence].)

Defendant asserts forfeiture should not apply because the application of "section 352 provides a safeguard that strongly supports the constitutionality of section 1108." (*People v. Falsetta, supra,* 21 Cal.4th at p. 916.) Moreover, by generally objecting to the instruction at issue, it can be posited that defendant could only have been invoking section 352, given the state of the law following *Villatoro, supra,* 54 Cal.4th 1152.

It is unclear whether our Supreme Court in *Villatoro* intended to require trial courts sua sponte to consider section 352 considerations whenever the prosecution seeks to instruct the jury on the use of evidence of charged sexual offenses as propensity evidence. In the context of interpreting section 1108, the court observed that "[r]ather than imposing an additional hurdle to the admissibility of character evidence, . . . the inclusion of section 352 merely makes 'explicit' the point that section 1108 does not *supersede* section 352 or other provisions of the Evidence Code." (*Villatoro, supra,* 54 Cal.4th at p. 1163.) This might be read to suggest that a trial court would not be expected to look at section 352 unless it was asked to do so by the defendant. But when the *Villatoro* court turned to the argument "that the trial court did *not* undertake a section 352 analysis here before giving the modified instruction," there was no consideration of whether defendant actually requested such an analysis at trial. (*Villatoro,* at p. 1168.) Instead, the *Villatoro* court concluded "that the trial court implicitly conducted a section

352 analysis" and that "any error in failing to conduct such an analysis was harmless." (*Ibid*.)

We likewise conclude that any error in failing to conduct a section 352 analysis was harmless under the circumstances of this case. The victims' ages, the conduct reported by the victims, and the location of the lewd acts were all similar. (*Villatoro*, *supra*, 54 Cal.4th at pp. 1168-1169.) None of the counts were particularly inflammatory as compared to the other counts. Given the purpose of section 1108 and our Supreme Court's interpretation of section 1108 in *Villatoro*, the court correctly allowed evidence of charged offenses to be used as propensity evidence.

We also note there is virtually no chance the court would have ruled in defendant's favor had it actually conducted a section 352 analysis on the record. As defense counsel argued before trial (in opposing the admission of evidence pertaining to uncharged sexual offenses against another alleged victim), "isn't the fact that there are three current . . . alleged victims, isn't that sort of in and of itself [section] 1108 evidence? [¶] Do we really have to go back to 1995 and drag out other old stuff . . . . I mean, that's really sort of rubbing salt in the wound. I don't think it's needed." The court, applying section 352, ruled in favor (at least tentatively) of the prosecutor's request to present evidence of uncharged conduct, subject to the defense being provided the opportunity to contact necessary witnesses. Though the record does not disclose the reason, the evidence of uncharged conduct was not actually presented to the jury. But given the court's inclination to allow evidence of an uncharged 1995 incident as section 1108 evidence, this battle shows that the court would have instructed the jury with the prosecution's modified CALCRIM No. 1191 even if it had explicitly considered section 352 in the context of the charged offenses.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.